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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Peter H. Kang, Magistrate Judge

IN RE: SOCIAL MEDIA ADOLESCENT)
ADDICTION/PERSONAL INJURY)
PRODUCTS LIABILITY LITIGATION) **NO. 22-MD-03047 YGR (PHK)**
_____)

San Francisco, California
Thursday, March 21, 2024

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Thursday - March 24, 2024 **1:06 p.m.**

P R O C E E D I N G S

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THE CLERK: Now calling Multidistrict Litigation 22-3047, In Re: Social Media Adolescent Addiction and Personal Injury Products Litigation.

Counsel, when speaking please approach the podium and state your name.

THE COURT: Okay. We're here for the monthly discovery management conference. I have received the party's joint status report, Docket 686.

Good afternoon, everyone.

So it's clear to me the big issue is state agency discovery. So who's going to talk about that on each side?

MR. OLSZEWSKI-JUBELIRER: Good afternoon, Your Honor. Josh Olszewski-Jubelirer for the People of the State of California.

THE COURT: Okay. Do you speak on behalf of all the state AGs?

MR. OLSZEWSKI-JUBELIRER: California is a member of the leadership coalition of state AGs. I'm here representing the People of the State of California.

THE COURT: Okay. Well, if your -- do you -- well, if your views differ with any other state AGs, you need to let me know because, I mean, you're either presenting arguments as a

block or not.

MR. OLSZEWSKI-JUBELIRER: Of course, Your Honor.

THE COURT: Okay.

MR. HALPERIN: Good afternoon, Your Honor. Greg Halperin from Covington & Burling on behalf of the Meta defendants.

THE COURT: Okay. And just for the record, I both received the submissions and the joint report as well as the separately filed is it Joint Statement Re State Agency Discovery from the parties?

So here's where I am on this issue. Okay. And thinking about it further, it appears to this Court that this is an issue that's going to depend on individual state law, state government structure in terms of the state constitution, and the specifics of each state.

So the briefing the parties have submitted to me has been kind of blanket with regard to treated all states as if they're equal, and I think defendants -- well, Meta would admit that it does differ from state to state in terms of whether the state constitution sets up the state AG in a different status as regard to other agencies, doesn't it?

MR. HALPERIN: That's true, Your Honor, and certainly the law as to whether the state AG is required to represent all agencies or not differs a bit by state.

THE COURT: Right. So I was trying to avoid a

multitude of briefs on this, but I think there's no way around it. I was considering doing it by chart, but I don't think that's going to work. It's just too many states.

So I'm going to order each state to provide a one-page supplemental brief on this issue addressing -- letter brief -- addressing specifically, and cite the law of that state or the constitution of that state, which prohibits or prevents the AG's office to access documents of the agencies that have been identified by Meta as being the agencies from which discovery would be sought. Right?

Because I also know that it could be, hypothetically, in some states the AG's office may have the ability to access documents from some agencies but not others. All right. So I want the focus to be on the agencies that have been identified by Meta for each particular state in the filing of the chart that you provided to the Court dated March 11th, 2024, which is entitled "State Attorney General Plaintiffs and Meta Defendants Joint Submission Regarding State Agencies Pursuant to Discovery Management Order Number 3."

All right. So, again, the briefing should focus on and address -- it's only one page -- address whether there is state law or state constitutional authority that prohibits or prevents the AG of that state from accessing the documents of the agencies of that state identified by Meta. Okay?

And discuss whether the state AG of that state lacks a

legal right to access the documents of those agencies under the Ninth Circuit's legal control test. I draw your attention to the In Re: Citric Acid Litigation cases, the case most people cite for that test. Okay?

On the defense side -- I assume it's Meta -- would address the flip side of that, which is cite and argue the law that shows that that particular state AG does -- is not prevented or is not prohibited from accessing the documents of the agencies of that state or whether there's law that specifically allows or requires the state AG to have access to documents of those agencies of that state and also discuss the legal control test.

On both sides as well, because this has come up in a slightly different context but it impacts this, I want both sides to address whether the AG of that state has taken a position or will take a position in this litigation that communications between that state AG's office and any of the listed agencies are privileged communications or not.

So I want to make sure that's clear. And so I want one page per state from each state and I want one-page rebuttal from Meta to each state. All right. So I think I'm facing 60 pages of briefing if I'm doing the math right.

Are there 30 states involved here?

MR. HALPERIN: There are 35, Your Honor.

MR. OLSZEWSKI-JUBELIRER: 35.

THE COURT: 70 pages of briefing coming my way. Okay?

All right. So that's what you're limited to, a page each. Okay? So make your arguments tight and succinct and address those issues. That's why I tried to narrow the issues to the one specifically that I've identified.

I will say separate and apart from this, I still want all the briefing. I haven't made a final decision on this issue; but as I noted at one of the prior CMCs, separate and apart from the legal control test and access test, strictly speaking, I believe under both Rules 1 and 26 and my general authority of discretion to control discovery, I have the authority to treat the agency as if it were a party if the state AG of that state is representing that agency.

This primarily affects the states such as -- I'm just going to pick one -- Colorado, which have already told me in the chart that they plan to represent all agencies of that state. I haven't made a final decision on that, so don't brief the issue. All right? I am still looking at that. But I am inclined to narrow the dispute somewhat to go down that route separate and apart from the legal control test and separate and apart from the Rule 34 approach and use my authority under Rule 26 and Rule 1 under the federal rules generally for that. But I haven't made a final decision on that, so I've already think I've heard your arguments on that point as well. So get me the briefing.

How long do you need for one-page briefs each? A week?

Is that enough?

MR. HALPERIN: I think that should be fine for us, Your Honor.

MR. OLSZEWSKI-JUBELIRER: Your Honor, I think -- I guess I have a couple of questions.

THE COURT: Sure.

MR. OLSZEWSKI-JUBELIRER: First of all, *Citric Acid* I think is very clear that the legal control test is the burden -- to establish is the burden of the party seeking discovery, and so this is Meta's burden here.

THE COURT: If you're going to argue that they haven't met the legal control test and you just want to argue that's their burden and you don't want to address the issue, that's totally up to you, but then you haven't taken a position on the issue.

MR. OLSZEWSKI-JUBELIRER: Certainly, Your Honor. That's not what I was suggesting.

THE COURT: Okay.

MR. OLSZEWSKI-JUBELIRER: I guess what might be more helpful for you, Your Honor, is we're happy to see -- to have Meta serve us their arguments within a week and within a week after that we can respond.

I think the issue is there's 35 of us and there's just one of them, and so there's going to be at least some coordination in order to make the arguments sort of more cohesive.

THE COURT: You-all had no problem submitting the joint statement previously. What's the problem here with submitting joint -- 35 joint briefs to me?

MR. OLSZEWSKI-JUBELIRER: No problem with submitting 35 joint briefs. Part of the point was that if you -- if we're just sort of briefing past each other, it may not be as helpful to you as if we can take a look at what the party that has the burden has to say about it and we can express our views on whether that's right and whether that's wrong.

THE COURT: And that these are joint briefs; right? I don't do opening/opposition/reply for a reason. How you-all work out and negotiate the exchange of your sections in the joint brief is up to you -- all right? -- but it's not -- this is not opening/opposition/reply. We don't do it that way here; right?

And I made the issues succinct and narrow so that you're not going to be, hopefully -- if you're briefing past each other, then, you know, you'll have -- presumably you'll give each other some time to make slight adjustments if you need to if you actually are briefing past each other, and I expect you to work rationally and cooperatively on that.

MR. OLSZEWSKI-JUBELIRER: We're ready and eager to work cooperatively on that. Is it possible to have just a little bit more than a week? Two weeks?

THE COURT: Two weeks?

MR. OLSZEWSKI-JUBELIRER: Two weeks. Just because if we're -- if we're exchanging positions and looking at each other's side's positions and responding to them, we're talking about briefing this -- like sending initial positions maybe in the next couple of days.

THE COURT: So you've been meeting and conferring and discussing this issue amongst each other and against each other for months now, and you can't get it together in -- how about 10 days? Will 10 days work?

MR. OLSZEWSKI-JUBELIRER: We'll take whatever the Court will provide. I will say we have seen no -- Meta has not shared any authority with us that says that the AGs state by state have the legal control over these agencies.

THE COURT: That's why I'm asking for the briefing. But, I mean, you do understand, different cases cited, at least in the joint statement, address state law; right? So there are -- I mean, there have been cases -- the whole reason why I'm asking for the state-by-state briefing is it's clear the precedence here goes state by state.

So to say that they haven't given you any precedent for any states is not exactly correct; right?

MR. OLSZEWSKI-JUBELIRER: Again, Your Honor, I may have misspoke. I meant Meta has not gone state by state and presented this information to us. We've certainly seen their cases, that's right, Your Honor.

THE COURT: That's exactly why I'm ordering it. So is 10 days enough?

MR. HALPERIN: Yes, Your Honor.

THE COURT: All right. Let's do 10 days. And I'll -- I don't think we need more argument after that, but I'll give you further direction once I see the briefing on whether there's going to be argument or not. Okay?

MR. HALPERIN: Your Honor, if I could just ask a point of clarification just so we don't run afoul of Your Honor's expectations. Is it one page single spaced like in the joint brief?

THE COURT: Yes.

MR. HALPERIN: Thank you, Your Honor.

MR. OLSZEWSKI-JUBELIRER: And, Your Honor --

THE COURT: Normal margins. So no fiddling with margins or fonts or anything.

MR. HALPERIN: Absolutely.

THE COURT: All right.

MR. OLSZEWSKI-JUBELIRER: Just one point of clarification, and then I certainly do have some thoughts to share on the joint briefing that I think may be helpful in sort of framing this.

But the question for clarification was just the entities that we are addressing are just limited to those in that joint submission; right? In Meta's list of 275; is that right?

THE COURT: They represented those are the agencies they expect to take discovery from so, yes. Right. I mean, I think I was -- was I not clear? I thought I was clear on that, that you should be addressing whether they have access to or are prohibited from getting access to the documents of the agencies that are listed and that were identified by Meta as the agencies they want to take discovery from in the March 11th chart I think.

MR. LEWIS: Sorry, Your Honor. Chris Lewis for the states.

The reason that comes up as an issue, the discovery that's been served is much, much broader as to the agencies, the legislature, and other entities that they've requested from and RFPs that have been served. So we just want to make sure that we are working off that list and not off the much broader definition of who RFPs were being served on through the AG's office.

THE COURT: Well, I didn't think Meta served any subpoenas yet. Have you served subpoenas?

MR. LEWIS: No subpoenas.

MR. HALPERIN: We have not, Your Honor.

MR. LEWIS: It was request for production of documents that defined "you" to include a larger number of agencies than what was on that filing, and I think that actually also included the state legislature.

THE COURT: I believe my instructions were that this chart that was submitted to me March 11th --

MR. LEWIS: That's perfect, Your Honor.

THE COURT: -- were to list the agencies from whom Meta intended to take discovery only, and not every other -- if they left them off the list, they left them off the list, they're not taking discovery from that other agency. Right?

MR. LEWIS: Sure.

THE COURT: If they want to, you know, take a position later on somebody else that's not on the list, they're going to have to show good cause.

MR. LEWIS: Thank you, Your Honor.

THE COURT: Any other clarifications?

MR. OLSZEWSKI-JUBELIRER: No other clarifications, Your Honor. I did want to address a couple of things from the letter brief with Your Honor's indulgence.

THE COURT: Well, all right, given the fact that we're going to be briefing the more precise issues state by state and, like I said, this joint statement really kind of treated this as a blanket matter, which I don't think actually is helpful in resolving the issue, so I'll give you a little bit of time to make your point; but if it's going on a tangent that I don't think is going to help resolve it, I'm going to move on.

MR. OLSZEWSKI-JUBELIRER: Thank you, Your Honor.

I think -- I just want to make two quick points about some of the arguments from the letter briefs. I will -- I agree with Your Honor that the issue of control is really critical, and you'll see arguments about that we do not have control over these agencies.

I think from the case law that you've seen, Meta's cases are distinguishable. They fall into essentially three buckets; cases in which AGs have alleged harm to specific agencies. That's not the case in this litigation. We do not allege harm to any specific agencies. We're not seeking relief on behalf of any agencies.

There are cases in which the state is sued as a defendant in the context of redirecting or equal protection claims --

THE COURT: You're repeating arguments you made in your brief.

MR. OLSZEWSKI-JUBELIRER: Okay.

THE COURT: You don't need to repeat arguments you made in your brief.

MR. OLSZEWSKI-JUBELIRER: Just moving beyond that, I think on civil penalties --

THE COURT: Yes.

MR. OLSZEWSKI-JUBELIRER: -- Meta's argument is that the agencies that would be subject to discovery would depend on a speculative idea of who might receive a recovery when it's appropriated by the legislature. I'm not aware of any case

that holds this with respect to civil penalties.

Meta asks to take it one step further. They say because some states' civil penalties could be -- could go to the General Fund and be appropriated to any agency, then all states must be subject to discovery for all agencies.

And I think one thing that's important to note is even with respect to some of the agent -- some of the states they listed, California, our civil penalties do go to the General Fund, three paragraphs down from the paragraph they cited, "The statute is very clear that for the exclusive use of the Attorney General for consumer protection enforcement."

In terms of the arguments about our cases, they're just factually incorrect. *Locklear* is a consumer protection case that raises the exact same UCL and FAL claims and sought civil penalties. *Novartis* is a False Claims Act case that also sought civil penalties. *Warner Chilcott*, which they don't specifically address, also includes consumer protection claims which sought civil penalties. And I'll leave it there.

THE COURT: Okay. Let me make clear. On the briefing on legal control, I want you to address not the test in general but whether the state agents -- whether the AG has the legal right to access the documents under the legal control test -- all right? -- or lacks the legal right to access. All right? Legal right to access, that's what I want you to tell me, whether or not that state AG has that legal right or not.

Okay?

MR. HALPERIN: I understand, Your Honor.

THE COURT: Okay. Anything further from either side on state agency discovery at this point?

MR. HALPERIN: We'll respond in our letter briefing, Your Honor.

THE COURT: Okay. Anything further?

MR. OLSZEWSKI-JUBELIRER: Nothing at this time, Your Honor.

THE COURT: Okay. Great.

All right. So let's turn to the status report itself.

Now, I was -- maybe I don't want to get too optimistic, but in the section on issues ripe for dispute, there are only four listed and three of them have already been kind of resolved. Like, I issued the depo protocol. We did the depo protocol earlier this week.

Who's here to talk about depo protocol here again? I just want to -- I never set a deadline to get the -- please come forward.

So I don't know if you've had a chance to see the order that we issued on the depo protocol. First, any questions on that order from either side?

MS. KOUBA: No, Your Honor. We did have a chance to review it. No questions.

And I apologize. It's Annie Kouba with Motley Rice for

the plaintiffs.

MR. CHAPUT: Isaac Chaput, Covington & Burling, for the Meta defendants.

We did receive Your Honor's order, and no questions from defendants at this point. Thank you.

THE COURT: And one thing I specifically didn't do because I knew we would come back today was ask you: In light of the hearing and now in light of the order, how much time do you need to submit, hopefully, the final proposed depo protocol for me to sign off on.

MS. KOUBA: Your Honor, in light of your order and the transcript having already come through, I don't think that there should be any delay at all. A couple of days; but if defendants think they may need longer --

MR. CHAPUT: Maybe just a week, Your Honor, just to make sure that we can iron everything out in case there are --

THE COURT: The end of next week.

MR. CHAPUT: Thank you, Your Honor.

THE COURT: And so what is next Friday?

MR. CHAPUT: I believe it's the 30th.

THE CLERK: 29th.

MR. CHAPUT: 29th.

THE COURT: Deadline to submit is March 29th. Okay? Great.

And then I saw there's no need for a source code protocol

at this juncture. And has that stip and proposed order come in yet? I know you said you were going to file it. I checked the docket. I didn't see it yet.

MR. WARREN: Good afternoon, Your Honor. Previn Warren for the plaintiffs with Motley Rice.

No, nothing's come through. And, actually, we've reached agreements with defendants that I think we're just going to forgo both the source code protocol and any sort of stipulation or waiver on the docket.

The shared understanding is that plaintiffs are not going to be seeking access to the source code itself, meaning the actual programming instructions, unless and until defendants put that at issue.

We have reserved our rights to seek other documentation that pertains to source code. That's source code adjacent is what we're sort of calling it. You know, it may be that if and when we request those documents, there are issues to bring to your attention regarding confidentiality or such related things, but those are not ripe at this time.

THE COURT: Okay. Well, presumably if it's not source code, then it would still fall under the existing protective order now, so --

MR. WARREN: Correct, Your Honor.

THE COURT: -- for the most part it shouldn't require -- there won't be a dispute.

MR. CHAPUT: I think that's generally correct, Your Honor. There is a little bit of lack of clarity in exactly what plaintiffs contemplate might fall within that category of source code adjacent and there may be limited instances beyond where some additional protection beyond highly confidential competitor would be called for. And we would, of course, meet and confer with plaintiffs once we come across such an issue and bring it to the Court expeditiously if there is a problem.

THE COURT: So the record's clear, it's my understanding I should not expect a stip or proposed order; you're just agreeing among counsel?

MR. WARREN: Correct, Your Honor. We don't feel the need to put it on the docket at this time.

I mean, to preview the issue, we take the position the protective order is sufficient to handle whatever we'd be requesting; but, again, we'll sort that out with defendants before bringing it to your attention.

THE COURT: Okay. And then I think we issued the order on the clarification on discovery limits right before this hearing. Did you-all see that?

MR. CHAPUT: That's correct. We saw that, Your Honor. Thank you.

THE COURT: And in terms of formatting, it includes the entire statement on top of the proposed order -- or the

order because the order, I think by its terms, refers back to the stipulation and the statement. So there was no way to separate them and file it as a separate document.

I would suggest for future proposed orders, if it's a stipulation, like cut and paste the stipulation into the proposed order so we don't have to file the whole thing.

MR. WARREN: Understood, Your Honor.

THE COURT: Okay. And we covered state agency. So we're done for today; right?

MR. WARREN: We could be. I think there are -- you know, there's always things that we can raise, and --

THE COURT: Is it like the last CMC where there are issues in the discovery issues not currently ripe but that you want to talk about?

MR. WARREN: There may be some, Your Honor. There actually has been one somewhat late-breaking issue that's come up that may require the attention of the Court, although it may be premature, we're still talking about it, and that's that certain depositions have been noticed by a state Attorney General that is not part of the multistate coalition in the MDL.

And, you know, my understanding is there aren't dates actually set for those deponents yet. Those are Meta employees or former employees. I think there's three. And so it does leave some unanswered questions around how we deal with that

cross-noticing issue given that we, you know, haven't received the custodial files for those individuals and don't have the same level of coordination with that particular Attorney General that we do with our 35 Attorney General colleagues who are represented here today.

THE COURT: So how many depos are we talking about?

MR. CHAPUT: There are three depositions, Your Honor. And we actually previewed this item earlier this week when we were before Your Honor. I think it is premature.

We have Your Honor's deposition protocol order. Now we understand kind of what the steps are that we need to follow. I think the parties need to meet and confer, including with the Attorney General who is proceeding in state court, before we -- there's anything further for us to discuss with Your Honor.

MR. WARREN: I would agree with that, yes.

THE COURT: Just for my own edification, which state is that?

MR. CHAPUT: Tennessee.

THE COURT: Tennessee, okay. Call it a nonparty AG.

MR. WARREN: Correct.

THE COURT: Okay.

All right. Well, hopefully everything works out fine with that other AG in Tennessee.

Okay. Other issues you want to raise from the other parts of the status report?

MR. WARREN: Your Honor, there is an issue around initial disclosures that might be profitable to discuss at this juncture that was actually fairly well ventilated in the discovery management conference statement that we could talk through. This was flagged as not ripe but, you know, maybe it's more better described as sort of ripe.

I think that the issue that we have right now is that -- well, it's a sort of two-way issue. I think there are complaints in both directions about the initial disclosures that have been proffered to date.

Our position is the plaintiff fact sheets are due on April 1st, and really everything that they're looking for will be provided through that, including an extensive damages section of the PFS that will provide that computation.

Our understanding of Your Honor's prior remarks at the DMC from January is that we could, in essence, sort of put down a placeholder for those PFSs and then those PFSs will come in to provide a robust amount of information.

In the other direction, you know, we've been quite disappointed with the initial disclosures offered by defendants.

THE COURT: Before we get to the second dispute --

MR. WARREN: Sure.

THE COURT: -- let me just cover the first one.

For the record, why don' you --

MR. DRAKE: Geoffrey Drake, King & Spalding, for the TikTok defendants.

THE COURT: So what is it in Rule 26(a)(1) that won't be in their plaintiff fact sheets that you need?

MR. DRAKE: As we laid out in the letter, that we anticipate that the fact sheets will provide the information that we expected to receive in the initial disclosures. So I don't think that there's anything ripe for the Court to adjudicate today.

We didn't file a motion or raise any concern. We simply sent a letter to the plaintiffs expressing our dissatisfaction that even information they already knew at the time the disclosures were due wasn't provided, and we said in the letter "We anticipate you're going to cure this on April 1st in your fact sheets." And we expect that to be cured immediately because we only get two weeks after that then to make our bellwether selection, so there's limited time.

THE COURT: So in terms of the timing issue -- and I should have checked the docket -- is April 1st the date to provide plaintiff fact sheets or is it the deadline by which they have to be submitted or exchanged?

MR. WARREN: Well, I think in all -- for all practical purposes, those are one and the same given that it's about a week away, but we expect the plaintiffs' fact sheets for all cases that would be in the bellwether pool to be filed on

April 1st as they're required to be. So it sounds like we don't have a dispute here.

THE COURT: Okay. My question is: Are any of them ready to go? I mean, why hold back? If any of them are ready to go, why hold back?

MR. WARREN: We passed that along to all of the plaintiffs' attorneys, and they understand they should be filing on a rolling basis; but I think as these things tend to happen, you know --

THE COURT: My only directive then is to make sure all the plaintiffs' attorneys know that, you know, if they're ready to go, they shouldn't hold back artificially.

MR. WARREN: Absolutely, Your Honor.

MR. DRAKE: Thank you, Your Honor.

I think that was really our point in many instances. If the information is already in the possession of counsel, which I have to assume it is, particularly for these school districts which are akin to corporate entities that are suing, we'd like to get that information. We think we were entitled to it two weeks ago, but we're trying to be reasonable about it and we'll look forward to the supplement.

THE COURT: Okay. So really no dispute there, and we'll just try to work things through --

MR. WARREN: Yes, sir.

THE COURT: -- as expeditiously as possible.

MR. WARREN: Yes, sir.

THE COURT: Okay. And plaintiffs' complaint as to the defendants' initial disclosures, I don't want to put words in your mouth, but it's basically that the plaintiffs feel like they didn't identify enough potential witnesses.

MR. WARREN: Well, that's one issue. You know, as you know, there's four components to the Rule 26(a)(1) disclosures. You know, as for the witnesses, you know, the plaintiffs actually identified eight times the number of Meta employees that Meta themselves identified, five times the number of Snap employees, and three times the number of TikTok and YouTube employees respectively. So, you know, that's just based on our fairly limited ability to understand information based on the documents we have to date.

We don't really understand why the defendants, to really just paraphrase Mr. Drake's words from like 30 seconds ago, why if they're sitting on information about witnesses, they ought to be able to hold that back from us.

I mean, to provide one instance, Mr. Zuckerberg of Meta Mr. Spiegel of Snap, two highly percipient fact witnesses that run the company and designed the software at issue, not identified on the initial disclosures.

I think the argument that's been put back to us is, "Well, you already know that." And perhaps that's true with respect to those two individuals, but what about all the other ones?

And, you know, we are troubled that there wasn't a fulsome disclosure.

With respect to the insurance agreements, what we got back was, you know, "If you request them, we'll provide them." But that's not actually what the rule says. The rule requires the defendants to actually provide through the disclosures for fair inspection and copying. So, I mean, I suppose --

THE COURT: Before you -- so let's do subissue one.

MR. WARREN: Sure.

THE COURT: Okay. In terms of witnesses, nobody gave them to me, so do the defendants' initial disclosures have sometimes the standard language is that you incorporate by reference every witness identified by any other party in the case or did you just limit it to the people strictly you're identifying?

MR. DRAKE: It absolutely incorporates by reference other parties' initial disclosures, but I think it seems that as between the plaintiffs and defendants here, we maybe have a difference of a viewpoint about what the rule actually requires.

THE COURT: I was going to get to that.

So you understand their position is that, and the rule says, it's only witnesses they intend to rely upon for their defenses. So if they don't list Mr. Zuckerberg, just as an example, on their list, that means they're not planning to rely

on him for their defenses.

You may rely on him for your cause of action, but that -- the rule I think on its face doesn't require them to list people that they're not intending to rely upon. Right? That's the gist of their argument. I think on the face of the rule, they're right.

So but the flip side of that is if you do know of other people at your respective client companies who you plan to rely on, even reasonably expect to rely on, you do need to list them. You can't hold them back.

MR. DRAKE: Absolutely, Your Honor, and that's the approach that we took. We tried to identify -- I think I can speak safely for all four defending groups, we tried to identify the individuals that at this point in time we reasonably anticipate relying on for the presentation of our defenses, which of course is a different list than a list of every single person at every one of our companies who may have discoverable information. That's something that will be sorted out, and it sounds like the plaintiffs already have a pretty good working list of who they think has discoverable information.

I think there's also a difference of opinion between the parties, respectfully, as to what the scope of these cases are about. I think the plaintiffs are taking the position that every decision that's ever been made by any one of our clients

about anything about the platforms is part of the case. We don't agree with that. We laid that out in our initial disclosures. We've laid that out in other objections, and I think that will get slowly adjudicated as we move through the discovery process. And the Court will make a decision about whether we're right or wrong about that, but that certainly informed our decision making as it related to our identification of witnesses.

THE COURT: Okay.

MR. WARREN: So, Your Honor, if it's, in fact, true that Meta only intends to rely on four people for their defense, then I suppose we have no dispute.

We're a little incredulous with that, frankly, given the scope of this case, the size of it, and its importance for the company and its, frankly, national visibility; but, you know, that is what they have done. They have put four people on their initial disclosure witness list, and so there it is.

THE COURT: And on that point -- right? -- every party has a duty to supplement their disclosures; and if any defendant, not just Meta, suddenly adds 30 people to their initial disclosures one month before discovery closes I'm -- you know, I for one am going to look unkindly on that. Right? I'm not going to preside over the trial on this but, you know, Judge Gonzalez Rogers is probably going to think carefully about -- I'm taking the implied argument -- those witnesses

should be barred from testifying; right? I don't want to put words in your mouth.

MR. WARREN: No, no. Those were the words in my mouth. Thank you.

MR. DRAKE: Understood, Your Honor.

And I don't want to speak for Meta in terms of who they identified in their disclosures, but obviously 23 company witnesses across four defendants are probably three to four times more than Judge Gonzalez Rogers will probably allow testify live at trial. I mean, we're not going to have 10 months to do this trial. So we're trying to -- obviously these are the witnesses, as stated in the rule, that we may rely upon, and we understand our rule and obligation to supplement under Rule 26.

THE COURT: I trust able counsel to make good strategic choices and, you know, weigh all the pros and cons.

On the insurance agreement issue, I mean, same argument applies. The face of the rule requires you to produce the insurance policies; right? I mean --

MR. DRAKE: My client doesn't have any insurance, so perhaps I should pass the point two to one of the other representatives of the other client groups that do have insurance. Thank you.

THE COURT: Okay.

MS. SIMONSEN: Good afternoon, Your Honor. Ashley

Simonsen, Covington & Burling, for the Meta defendants.

I believe the rule states that the defendant shall make available for inspection and copying copies of the relevant insurance policies, which we have agreed to do. I'm happy to follow up with plaintiffs to set a time or logistics to make that happen.

THE COURT: So there's no dispute.

MR. WARREN: Well, the dispute is just that that should have been provided with the disclosures; but if they're going to provide it tomorrow, great. I think we just -- we have asked for it. It's required under the rule. We're just simply looking for a date by which they're going to be provided.

MS. SIMONSEN: Your Honor, unlike the rule that, for instance, requires plaintiffs to provide the documents underlying damages calculations with their initial disclosures, the rule on insurance disclosures simply requires that we make them available for inspection and copying, not that we provide copies. And so for that reason, we approached it the way the rule describes it.

I'm happy to meet and confer with plaintiffs to make them available in whatever way is most convenient for both sides, but I also do want to point out that the plaintiffs have not produced to us actual documents that they were required to produce with their initial disclosures. So I think we can work

together on this. I'm not sure it's something we need to be raising with Your Honor.

THE COURT: Okay. Why don't you work it out amongst yourselves. I think you both understand what the rule requires, and I think it sounds like it's just a matter of logistically getting the insurance agreements over to the plaintiffs.

MR. WARREN: That's sounds fine, yeah.

THE COURT: Okay. Other issues anybody wants to raise at this point?

(No response.)

THE COURT: Okay. So there was -- I'm going to raise one. There was the extensive argument about the scope of discovery impacted by the Court's, not mine, Judge Gonzalez Rogers' order on the motion to dismiss. So who's ready to talk about that?

Identify yourself for the record.

MS. HAZAM: Your Honor, Lexi Hazam for plaintiffs.

MR. SCHMIDT: Good afternoon, Your Honor. Paul Schmidt for Meta.

THE COURT: Good afternoon.

So thank you for your briefing on the issue. I understand it's an issue, quote, not ripe for decision so I'm just going to provide you some guidance here, and you just work it out amongst yourselves in light of that.

So the relevant part of -- this is the order in this relevant part to denying in part the motion to dismiss. This is Docket Number 430, the order of November 14th, 2023. The order reads (as read):

"Claims 2 and 4 allege that defendants distributed defective and unreasonably dangerous products without adequately warning users of risks," and then it goes on. Next sentence (as read):

"The Court defines the risks are those created by the defects addressed in Claims 1 and 2."

And then further on (as read):

"The Court finds these claims plausibly alleged that defendants are liable for conduct other than publishing of third-party content, and the duty arises not from their publication of conduct but from their knowledge based on public studies or internal research of the ways that their products harm children. Plaintiffs allege through these claims that defendants can meet this duty without making any changes to how they publish content by providing warnings for any and all of the alleged defects."

So the Claims 2 and 4 were not dismissed and on the face of it keep any and all of the alleged defects in the case. That's the way I read the order.

MS. HAZAM: It's also how we read the order, Your Honor.

MR. SCHMIDT: And our position on that is simply we recognize that's what Judge Gonzalez Rogers ruled. She spoke to the issue actually with both of the two of us at the podium. The next conference we had we were obviously guided by that.

Our only view is it should make some difference. There is a difference between a failure to warn claim on those potential features and a design defect claim on those potential features, and we think we should meet and confer about how that impacts things obviously guided by what Your Honor just said, guided by what Judge Gonzalez Rogers said, guided by the order.

We started doing that on the Meta, and we hope -- we have a meet and confer scheduled tomorrow with the plaintiffs and hope to present some of our thoughts on that. We've preliminarily presented them, and I think each defendant intends to do the same.

THE COURT: Okay.

MS. HAZAM: Your Honor, if I may.

THE COURT: Yeah. Sure.

MS. HAZAM: It's our view that we shouldn't be meeting and conferring about a claim that's clearly in the case. Failure to warn is clearly in under both the Court's order and her confirmation of our interpretation of it at the hearing following it where she said, "Plaintiffs are correct," and that was after I indicated that failure to warn extends to features that are precluded as bases for direct liability under

Section 230.

So we are obviously always happy to meet and confer with the defendants on specific discovery requests. The reason we flagged this scope objection to you is we believe it has no validity under the order; and if that objection is going to keep being raised and if defendants are going to curtail their productions based on it, we will be before you with briefing on the matter.

THE COURT: Which is why you should be meeting and conferring.

MR. SCHMIDT: Yes.

And just so we're clear, our position is not that the claim does not survive. We have a Court ruling on that issue. Our position is simply that requires some consideration as to what discovery tracks to that claim. That's what we want to meet and confer on.

THE COURT: Okay. But the way I read the order, all the alleged defects in the complaint are part of the case.

MR. SCHMIDT: As to that claim, yes.

THE COURT: As to Claims 2 and 4.

MR. SCHMIDT: Yes.

THE COURT: Right. So I would go into the meet and confers with that in mind because I think that would be a fairly straightforward motion if it gets presented to me.

Okay. So any other -- I hate to raise issues if nobody

wants to talk about them. Let me just see if there's something else I need to touch base with you-all.

Oh. So I know you're still meeting and conferring on some of the privilege log protocol issues. Who's here to talk about privilege log protocol?

MS. McNABB: Good afternoon, Your Honor. Kelly McNabb, Lieff Cabraser, for the plaintiffs.

MS. LOPEZ: Good afternoon, Your Honor. Laura Lopez, Munger Tolles & Olsen, for the defendants.

THE COURT: Okay. What I didn't do I think previously is give you a deadline to work towards finalizing this, and so how -- are you ready? Have you worked through your issues? Are you ready to submit something soon?

MS. McNABB: We just received some additional edits back from defendants yesterday. So I would think that we could have final protocol submitted to Your Honor by Friday of next week.

THE COURT: All right. Does that work for defendants?

MS. LOPEZ: I haven't had a chance to confer. We were prepared to offer at least two weeks to give us time to meet and confer and finalize, Your Honor, but --

THE COURT: Well, why don't you confer with them right now --

MS. LOPEZ: Sure.

THE COURT: -- and see if you can do it by next

Friday.

(Pause in proceedings.)

MS. LOPEZ: Your Honor, if it's possible to have 10 days, the defendants would appreciate that.

THE COURT: Okay. Today is the -- so 10 days, that would bring us -- well, 10 days is a Sunday; right? So Monday, April 1st?

MS. McNABB: That's amenable to plaintiffs, Your Honor.

THE COURT: All right. So deadline to submit the proposed privilege log protocol is Monday, April 1st.

Okay. Anything else on privilege log?

MS. McNABB: Nothing at this time, Your Honor.

THE COURT: All right.

MS. McNABB: I don't want to speak for the state AGs. No, nothing for the state AGs either, Your Honor.

THE COURT: Okay.

MS. LOPEZ: No, nothing else for defendants. Thank you, Your Honor.

THE COURT: Okay. If nobody wants to talk about the TikTok videos, I'm not going to touch it, except encourage you to keep meeting and conferring and work it out.

MS. McNABB: Yes, Your Honor. Thank you.

MS. LOPEZ: Thank you.

THE COURT: Oh, I just want to confirm the plaintiffs

had put -- I assume mainly plaintiffs have put in an explanation of how they're complying with the lead counsel meet-and-confer requirements of my standing orders. What -- it doesn't state here, but I assume the defendants don't have any objection to what the plaintiffs are doing.

MR. SCHMIDT: No, we don't, Your Honor.

Paul Schmidt again for Meta.

THE COURT: Okay.

MR. SCHMIDT: We have no objection to their position. We understand they have no objection to the position we put in on that issue.

THE COURT: Okay. All right. Good.

Then that is all I have I think. Yes.

MR. SCHMIDT: Yeah, we did want to flag that issue for the Court because the Court has now several times referred to the lead counsel requirement, including on Monday, which I was able to attend remotely, and which I appreciate being able to attend remotely.

We just wanted to put that in to make sure we're giving the Court what the Court is expecting. It's challenging in a case this complicated, but we think we've come up with something that meets what the Court is telling us to do.

THE COURT: And I appreciate that. And like I think I said in the order the other day, I applaud the parties for continuing to meet and confer and working out these issues.

It's good for you. It's good for me. It's good for everyone. So thank you.

MR. SCHMIDT: Thank you, Your Honor.

THE COURT: So last chance to raise any issues for this month's DMC.

MR. WARREN: Nothing for the plaintiffs, Your Honor.

MR. SCHMIDT: Nothing here, Your Honor.

THE COURT: All right. We're adjourned until the next hearing then. Thank you.

MR. WARREN: Thank you, Your Honor.

THE COURT: Thank you.

THE CLERK: We're off the record. The matter is adjourned. The Court is in recess.

(Proceedings adjourned at 1:49 p.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Thursday, March 21, 2024

Kelly Shainline, CSR No. 13476, RPR, CRR
U.S. Court Reporter